

NO. 48428-5-II

IN THE COURT OF APPEALS OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Petitioner,

v.

ANDREW PHILIP LINGLE

Respondent.

BRIEF OF PETITIONER

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A. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Julian E. St. Marie, Chief Deputy Prosecuting Attorney for Jefferson County, appeals the decision of the trial court dismissing the Information filed under Cause No.: 15-1-00194-4 for violation of Time to Trial Rules, pursuant to CrR 3.3 *et. seq.*

B. RELIEF REQUESTED

The State requests that this Court reverse the trial court's dismissal of Superior Court Cause No. 15-1-00194-4.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court abused its discretion when it refused to follow the plain language of CrR 3.3(c)(2)(i), mandating that where there is a written waiver of the defendant's rights under CrR 3.3 *et. seq.*, if no commencement date is specified the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

2. Whether the Superior Court abused its discretion in refusing to engage in a Constitutional analysis with respect to violation of defendant's speedy trial rights.

D. STATEMENT OF THE CASE

The State filed an Information on July 27, 2015, in the matter State v. Andrew P. Lingle, Cause No. 15-1-00105-7. CP 1. On September 18,

2015, the State amended the Information to add one count of Assault in the Second Degree. CP 24. This Count was designated as Count I in the Amended Information.

On September 18, 2015, defendant filed a written waiver of his right to a speedy trial to December 17, 2015. CP 28. The written waiver did not specify a commencement date.

On November 13, 2015, the court severed Count I of the State's Amended Information. CP 47. The clerk's minutes reflect that the severed count was to remain as a back-up trial, indicating it would track with the other counts. CP 52. The remaining counts were set for trial on December 14, 2015. CP 32.

Trial on the Fourth Amended Information commenced on December 14, 2015 on the remaining counts. On December 16, 2015, the jury returned a verdict of "Not Guilty" on those counts. CP 83.

On December 17, 2015, the State filed an Information under Cause No. 15-1-00194-4, alleging the previously severed count and adding an additional count of Assault in the Third Degree. CP 1 (15-1-00194-4).

On January 8, 2016, defendant moved to dismiss the Information for violation of defendant's right to speedy trial. The trial court granted the motion, noting "I'm not going to be overly attached to the omission of the term 'commencement date' on the September 18th Speedy Trial Waiver." VRP p. 26, ll. 14-16. The court stated, "[I]t makes no sense to

me that the Speedy Trial Waiver for a period of, you know, thirty days, sixty days, ninety days, or whatever,-ends up creating a period of a hundred and eighty seven days, or a hundred and ninety days”. VRP p. 26, ll. 1-5.

The trial court noted, “[E]verybody used that Waiver of Speedy Trial form and relied on that and used it and it’s never been raised as an issue that I’m aware of, until now, other than the fact that we changed the form here a number of weeks ago”. VRP p. 27, ll. 5-8. The court further stated, “[f]rom the time Speedy expired, which was December 17th there was a five day period that a motion could have been made to extend this out for twenty-eight days. And that motion wasn’t made”. VRP p. 27, ll. 11-14.

The trial court held that “the constitutional right to a Speedy Trial is not an issue here at all”. VRP p. 24, ll. 1-3. In so holding, the court stated, “the issue we’re dealing with is a court rule...if the time limits determined under this rule are not complied with the rule says the case shall, and this is shall-it’s mandatory-be dismissed with prejudice”. VRP p. 24, ll. 7-15.

E. ARGUMENT

- I. CrR 3.3(c)(2)(i) mandates that where there is a written waiver of defendant’s rights under CrR 3.3, if no commencement date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.**

The relevant subsections of CrR 3.3 provide:

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

On November 13, 2015, the court severed Count I of the State's Amended Information. CP 47. The clerk's minutes reflect that the severed count was to remain as a back-up trial, indicating it would track with the other counts. CP 52. The remaining counts were set for trial on December 14, 2015. CP 32. Thus, the date for trial for the severed count was December 14, 2015. Trial on the remaining counts did commence on December 14, 2015. On December 16, 2015, the jury returned a verdict of "Not Guilty" on those counts. CP 83.

No cause number was assigned to the severed count at the time it was severed. On December 17, 2015, the State filed an Information under Cause No. 15-1-00194-4, alleging the previously severed count, and

adding an additional count of Assault in the Third Degree. CP 1 (15-1-00194-4).

In this case, defendant signed and filed a written waiver of defendant's rights under CrR 3.3. CP 28. The written waiver did not specify a commencement date. CP 28.

A. Court rules are interpreted using recognized rules of statutory construction.

Court rules are interpreted according to principles of statutory construction. *State v. Blilie*, 132 Wn. 2d 484, 492, 939 P.2d 691 (1997), citing *State v. Greenwood*, 120 Wn. 2d 585, 592, 845 P.2d 971 (1993). Questions of statutory construction are reviewed *de novo*. *State v. Volvata*, 149 Wn. 2d 178, 183, 66 P.3d 1050 (2003); *State v. Roggenkamp*, 153 Wn. 2d 614, 621, 106 P.3d 196 (2005). Here, the plain language of CrR 3.3 (c) (2)(i) is unambiguous. By its plain language, this subsection mandates that if no commencement date is specified, the new commencement date shall be the date of the trial contemporaneously or subsequently set by the court. Here, the court set December 14, 2015 as the date for trial.

B. The unambiguous language of CrR 3.3(c) (2)(i) must be strictly construed.

Statutory construction begins by reviewing the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *State v. Avery*, 103 Wn. App. 527,

532, 13 P.3d 226 (2000). Statutory language is unambiguous when it is not susceptible to two or more interpretations. *State v. McGee*, 122 Wn. 2d 783, 787, 664 P.2d 912 (1993).

When statutory language is unambiguous, courts look only to that language to determine the legislative intent without considering outside sources. *State v. Delgado*, 148 Wn. 2d 723, 727, 63 P. 3d 792 (2003). Plain language does not require construction. *Id.* Courts interpret a criminal statute strictly and literally. *Id.*

In this case, the language of CrR 3.3(c)(2)(i), stating, “If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court” is susceptible to only one interpretation. Because the written waiver in this case does not specify a commencement date, the commencement date is December 14, 2015, the trial date set by the court. Thus, December 14, 2015 was the new commencement date for calculation of time to trial, pursuant to CrR 3.3 (c)(2)(i). As of January 8, 2016, only twenty-five (25) days had elapsed when the trial court dismissed Cause No. 15-1-00194-4.

II. Washington case law requires a Sixth Amendment Analysis.

As explained above, no violation of CrR 3.3 occurred in this case. With a commencement date of December 14, 2015, this out-of-custody defendant’s right to trial within 90 days was intact as of January 8, 2016.

Even if a violation of CrR 3.3 had occurred, the analysis does not end there.

A. A violation of the rules is not necessarily a constitutional deprivation.

While the statutes and court rules governing speedy trial rights were enacted for the purpose of enforcing the constitutional right to a speedy trial, they are not themselves a guaranty of constitutional rights. *State v. Iniguez*, 167 Wn. 2d 273, 287, 217 P.3d 768 (2009), *citing State v. Brewer*, 73 Wn. 2d 58, 62, 436 P.2d 473 (1968) (interpreting CrR 3.3’s precursor, RCW 10.46.010). Instead, CrR 3.3 provides a framework for the disposition of criminal proceedings without establishing any constitutional standards. *Id.* As a result, “a violation of the rules is not necessarily a constitutional deprivation”. *Id.*, *citing State v. Fladebo*, 113 Wn. 2d 388, 393, 779 P.2d 707 (1989) (*citing State v. White*, 94 Wn. 2d 498, 501, 617 P.2d 998 (1980)).

In enacting time-for-trial rules, the legislature did not “conceive or contemplate that the limitation so established should become an inflexible yardstick by which the constitutional guarantees to a speedy trial of felony charges would be measured”. *Brewer*, 73 Wn. 2d at 62, 436 P.2d 473.

B. Courts must use a balancing test to determine whether a constitutional violation has occurred.

Assuming, *arguendo*, that the trial court's refusal to follow the plain language of CrR 3.3(c)(2)(i) and holding that the commencement date in this case was September 18, 2015, the date the Waiver of Time to Trial was signed, it was error for the court to refuse to consider constitutional arguments.

Like the Sixth Amendment speedy trial right, the state right is "consistent with delays" and subject to the circumstances. *Id.*, *Barker v. Wingo*, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L.Ed. 101 (1972). Accordingly, the right is not quantified, does not depend upon whether the defendant made a specific request, and does not arise pursuant to some inflexible rule. *Id.*, at 522-25, 92 S. Ct. 2182. Because the state right is substantially the same as the federal right, and courts employ the same balancing test that was adopted by the United States Supreme Court, federal case law concerning the Sixth Amendment right is highly relevant to application of the state constitutional provision in any given situation. *Id.*

Courts use the balancing test set out in *Barker* to determine whether a constitutional violation has occurred. *State v. Ollivier*, 178 Wn. 2d 813, 827, 312 P.3d 1 (2013); citing *State v. Iniguez*, 167 Wn. 2d at 289, 217 P.3d 768 (2009). The analysis is fact specific and "necessarily dependent upon the peculiar circumstances of the case." *Iniguez*, 167 Wn. 2d at 288. The conduct of both the prosecution and the defendant are weighed.

Barker, 407 U.S. at 529-530. Among the non-exclusive factors to be considered:

- (1) The length of the delay;
- (2) The reason for the delay;
- (3) The defendant's assertion of his right;
- (4) Prejudice to the defendant.

i. The length of the delay in this case does not meet the threshold requirement of "presumptive prejudice".

Analysis of the length of the delay entails a double inquiry. *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L.Ed.2d 520 (1992). In order to trigger the speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay because by definition, the accused cannot complain that the government has denied him a speedy trial if it has, in fact, prosecuted the case with customary promptness. *Id.*, at 651, 112 S. Ct. 2686 (quoting *Barker*, 407 U.S. at 530-531, 91 S. Ct. 2182).

If this showing is made, a court must consider "as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim". The Court noted in *Doggett*, that while dependent upon the nature of the charges, lower courts had in general found presumptively prejudicial delay at least at the point at

which it approaches one year. *Id.*, at 652. In *Iniguez*, the court found presumptive delay triggering the *Barker* analysis where the more than eight month delay was substantial and the charges were not complex. In *Ollivier*, the court found that the 23-month delay was presumptively prejudicial. *Ollivier*, 178 Wn. 2d at 828. However, this does not mean that the right to speedy trial has been violated, but rather that the 23-month delay was sufficient to trigger the *Barker* analysis.

In this case, defendant was arraigned on July 31, 2015. Defendant executed a speedy trial waiver on September 18, 2015. As explained above, no commencement date was specified. By operation of CrR 3.3 (c)(2)(i), the new commencement date was December 14, 2015, the date of trial set by the court.

ii. The reason for the delay was not due to any neglect or malfeasance on the part of the State.

Pretrial delay is often both inevitable and wholly justified. *Doggett*, 505 U.S. at 656. Careful assessment of the reasons for the delay is necessary to sort the legitimate or neutral reasons for delay from improper reasons. *Id.* A court looks to each party's responsibility for the delay, and different weights are assigned to delay, primarily related to blameworthiness and the impact of delay on defendant's right to a fair trial. *Ollivier*, 178 Wn. 2d. at 831-832. At one end of the spectrum is the situation where the defendant requests or agrees to the delay and is

therefore deemed to have waived his speedy trial rights as long as the waiver is knowing and voluntary. *Id.* If the government deliberately delays the trial to frustrate the defense, this conduct will be heavily weighted against the State. *Id.* Moving more toward the center, if the delay is due to the government's negligence or overcrowded courts, the delay is still weighted against the government but to a lesser extent. *Id.*

Here, as explained above, the time for trial had not yet expired pursuant to CrR 3.3 (c)(2)(i). No delay occurred. The State is entitled to rely on the plain language of the rule. Even if this Court determines there was a delay, any delay was not due to any malfeasance or negligence on the State's part.

iii. This out-of-custody defendant does not meet the threshold requirement of presumptive prejudice.

The presumption of prejudice from pretrial delay is not automatically applicable whenever a defendant's trial is delayed. *Ollivier*, 178 Wn. 2d at 827. By definition, the accused cannot complain that the government has denied him a speedy trial if it in fact has prosecuted his case with ordinary promptness. *Id.* Here, the State never requested a single continuance. The State relied on the plain language of CrR 3.3 () (2)(i) in calculating time for trial. Any delay in time for trial was the result of defendant's written waiver. The State acted with ordinary promptness.

iv. No prejudice to defendant results from application of CrR 3.3 (c) (2) (i).

Defendant did not contend that he was prejudiced by application of the plain language of the rule. Even assuming for the sake of argument that the time to trial rule was violated, this out-of-custody defendant cannot demonstrate any prejudice as a result.

F. CONCLUSION

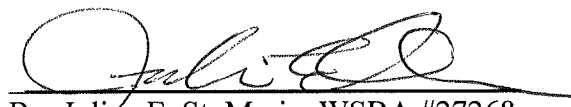
The plain language of CrR 3.3 () (2)(i) mandates where no commencement date is specified in a written Waiver of Time to Trial, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court. Here, the trial date set by court was December 14, 2015. Only twenty-five (25) days had expired.

As argued above, CrR 3.3 et seq., is not a guaranty of the constitutional right to speedy trial. The court erred in refusing to engage in any constitutional analysis.

This Court should reverse the trial court's dismissal of Cause No. 15-1-00194-4. By operation of CrR 3.3(c)(2)(i), the time for trial had not elapsed.

Respectfully submitted this 30th day of June, 2016.

MICHAEL E. HAAS, Jefferson County
Prosecuting Attorney, WSBA #17663


By: Julian E. St. Marie, WSBA #27268
Chief Deputy Prosecuting Attorney

PROOF OF SERVICE

I, Sarah Martin, certify that on this date:

I filed the State's BRIEF OF APPELLANT electronically with the Court of Appeals, Division II, through the Court's online filing system.

I delivered an electronic version of the brief, using the Court's filing portal, to:

Bret Roberts, Esq.
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on June 30, 2016

A handwritten signature in black ink, appearing to read "Sarah Martin", written over a horizontal line.

Sarah Martin
Senior Felony Legal Assistant

JEFFERSON DISTRICT COURT

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